

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus

Bankruptcy Judge

Modesto, California

August 7, 2000 at 10:00 a.m.

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1. 00-92015-A-7 FELIPE J. PEREZ HEARING ON ORDER TO SHOW  
CAUSE RE DISMISSAL, CONVERSION  
OR IMPOSITION OF SANCTIONS FOR  
FAILURE OF THE DEBTOR AND/OR  
DEBTOR'S ATTORNEY TO ATTEND  
THE SECTION 341 MEETING ON  
JUNE 22, 2000  
7/12/00 [7]

**Tentative Ruling:** This case shall remain pending on the condition that the debtor attended the rescheduled meeting of creditors on July 13, 2000. If the debtor failed to attend the rescheduled meeting of creditors on July 13, 2000, the case shall be dismissed without further notice or hearing.

2. 00-91846-A-7 RAMON J. MAGDALENO HEARING ON ORDER TO SHOW  
CAUSE RE DISMISSAL, CONVERSION  
OR IMPOSITION OF SANCTIONS FOR  
FAILURE OF THE DEBTOR AND/OR  
DEBTOR'S ATTORNEY TO ATTEND  
THE SECTION 341 MEETING ON  
JULY 6, 2000  
7/10/00 [12]

**Final Ruling:** The matter on calendar is denied or overruled as moot - the case was dismissed on July 10, 2000.

3. 00-92358-A-7 ROBIN & SHERRI MILLER HEARING ON ORDER TO SHOW  
CAUSE RE DISMISSAL, CONVERSION  
OR IMPOSITION OF SANCTIONS FOR  
FAILURE OF THE DEBTORS AND/OR  
DEBTORS' ATTORNEY TO FILE  
SUMMARY AND SCHEDULES A-J  
7/10/00 [6]

**Tentative Ruling:** This case shall remain pending if the debtors file amended schedules as described below. On June 19, 2000, the debtors filed a chapter 7 petition. The debtors did not file schedules A through J. On July 10, 2000, the clerk issued an order to show cause why this case should not be dismissed for failure to file these schedules. On July 24, 2000, the debtors filed schedules A-J.

However, Schedule G lists Sherri Louise Miller as a co-debtor. Schedule G is designed to provide the trustee and creditors with information about codebtors

of all types *other than spouses in joint cases*. 11 Collier on Bankruptcy, "Commencement of the Voluntary Case" § 8.41[1][B] (15<sup>th</sup> Rev. Ed. 1997). Joint debtors are not codebtors. If the Sherri Louise Miller listed in Schedule G is the same person as the debtor by that name, then the debtors' schedule G must be amended to reflect this fact. If not, then the debtors advise the court at the hearing that such is the case.

Further, Schedule I lists the debtors' monthly income as \$2,329.16. Schedule J includes business expenses incurred in the debtors' business in the amount of \$7,820.38. An attachment to Schedule J indicates that the debtors' actual monthly income is \$10,407.17 and their actual monthly business expenses are \$7,820.38. So the debtors have scheduled their net monthly income on Schedule I, which embodies their monthly business expenses, and have then listed those same expenses on Schedule J. They have thereby deducted their business expenses twice, giving the erroneous impression that they their expenses are more than \$8,000 greater than their income.

Amended Schedules shall be filed and served on the trustee within seven days.

4.	99-95012-A-7 STEVE MERCURIO 00-9032 JMO #1 AMERICAN EXPRESS CENTURION BANK, OPTIMA ACCOUNT VS.	HEARING ON MOTION FOR ORDER OF DEFAULT AND DEFAULT JUDGMENT 6/26/00 [8]
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**Tentative Ruling:** The motion for entry of default is denied. Furthermore, on the court's own initiative, the complaint is dismissed without prejudice because service of the summons and complaint on the defendant/debtor was defective and more than 120 days have passed since the filing of the complaint.

Service of an adversary complaint upon a debtor may be effected by two means. Service of an adversary complaint upon a debtor, after a petition has been filed by the debtor may be made by mailing a copy of the summons and complaint to the debtor and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address. Fed.R.Bankr.P. 7004(b)(9).

Service upon any defendant may be made by mailing the summons and complaint to an agent of the defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business. Fed.R.Bankr.P. 7004(b)(8).

The proof of service of the complaint, as well as the affidavit of counsel, indicates that the summons and complaint were served upon the debtor's counsel, the chapter 7 trustee, and the United States Trustee. The plaintiff did not serve the defendant or an agent for service of process.

Further, there is no time to correct this defective service. Fed.R.Civ.P. 4(m) provided that:

"If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, on motion or its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an

appropriate period."

Fed.R.Civ.P. 4(m) *as incorporated by* Fed.R.Bankr.P. 7004(a).

Because the service of the summons and complaint was defective and because 120 days has passed since the filing of the complaint, the court orders this adversary proceeding dismissed, without prejudice.

5. 99-95073-A-7 JOHN FRANCIS OWENS HEARING ON MOTION TO  
CWC #1 ABANDON PERSONAL PROPERTY  
7/17/00 [11]

**Tentative Ruling:** The motion is denied without prejudice. On July 17, 2000, Fred D. Killion and Colleen Killion, in their capacities as trustees of creditor Killion 1993 Family Trust filed a motion to compel the trustee to abandon two pieces of real property of the estate being (a) Two (2) acres of undeveloped real property located on State highway 108 in Tuolumne County, California, APN 47-780-07; and (b) 20705 North Sunshine Road, Soulsbyville, California.

The hearing on this matter is set for August 7, 2000, which is 21 days after the date of service of the moving papers on the respondent. Local Bankruptcy Rule 9014-1, Part II(b)(i) requires 22 days' notice of the hearing.

6. 00-91174-A-11 THE SHEPARD'S POUCH HEARING ON MOTION TO  
HM #2 EXTEND EXCLUSIVITY PERIOD  
(OST)  
7/24/00 [34]

**Tentative Ruling:** The motion is denied. On March 28, 2000, the debtor filed a petition under chapter 11. Charles Hastings represented the debtor. On April 27, 2000, the debtor filed an application to employ Mr. Hastings. The United States Trustee objected and on June 12, 2000, the court denied the application.

On May 9, 2000, a status conference was held and the court issued an order which set July 26, 2000, as the deadline for the debtor to file a disclosure statement. Coincidentally, July 26, 2000, is the end of the debtor's period of exclusivity to file a reorganization plan. See 11 U.S.C. § 1121(b).

On July 24, 2000, the debtor filed an application to employ the law firm of Hauser & Mouzes. On July 25, 2000, the court approved the application. On July 24, 2000, the debtor filed a motion to extend the exclusivity period to October 25, 2000. The motion is based on (1) the fact that the debtor was required to retain substitute counsel; and (2) the fact that the debtor is current on all obligations other than Lodi Airport (space rental), property taxes, and a debt owed pursuant to a state court judgment that is now on appeal. The debtor asserts that the extension will not exert any pressure on creditors because this "case is in hiatus pending the resolution of the appeal" of the state court judgment in favor of the primary creditor in the case.

The debtor states that its anticipated plan will (a) pay arrearages owed to creditors except the judgment creditor if entry of the judgment is reversed on appeal or (b) will result in a liquidation of the debtor's assets if the judgment is affirmed on appeal.

The motion is denied. The debtor's problems concerning representation were not beyond the debtor's control. First, the problem was entirely foreseeable and predictable -- bankruptcy counsel's joint representation of a partnership and a partner is an obvious and frequent problem in chapter 11 cases. Second, the debtor waited the absolute maximum number of days, 30, before applying to employ counsel. When that application was denied, it then waited another 42 days before applying to employ new counsel. This is especially troublesome in that the debtor is a partnership and as such must be represented by counsel when prosecuting an legal proceeding such as a bankruptcy case. In California, partnerships must appear in court proceedings through licensed counsel. The rule is the same in federal court. 28 U.S.C. § 1654; In re 1433 Corp., 75 B.R. 55 (Bankr. S.D. Fla. 1987); In re Global Construction & Supply, Inc., 126 B.R. 573 (Bankr. E.D. Mo. 1991).

Third, if, as the debtor asserts, no plan should be filed before its appeal has been resolved [and the court does not agree with this assertion], then no other entity will be able to file a confirmable plan until the appeal is resolved, and the exclusivity period is of no effect and its duration is of no relevance.

Fourth, the debtor asks for a 90-day extension of exclusivity, on the one hand, but then states that no plan can be filed until after the resolution of the state court appeal on the other. Given that the appeal has not yet been heard, if the debtor is correct, no plan will be filed until long after the expiration of the 90-day extension.

While the court will not extend exclusivity, it will extend the bar date imposed at the status conference to and including October 25, 2000. Its plan can compete with the plan filed by any party interest. The unsettled nature of the claim of the primary creditor will not impose a particularly difficult impediment to any plan proponent. Indeed, the motion acknowledges that the plan simply has to provide for two possible treatments of the claim -- one if the judgment is affirmed and one if it is reversed. If the court is wrong, it is an impediment for any plan proponent.

7. 96-90274-A-11 TRAFFIC SERVICES, INC.  
99-9241  
GARY R. FARRAR, TRUSTEE VS.  
UNION PACIFIC RAILROAD CO., UNION  
PACIFIC DISTRIBUTION SYSTEMS AND  
UNION PACIFIC FREIGHT SERVICES

CONT. HEARING ON DEFENDANT'S  
MOTION TO DISMISS  
4/14/00 [10]

**Final Ruling:** The movant or the objecting party has voluntarily dismissed the matter on calendar.